

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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(1)

No. 21, 933

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

462

JESSIE ELLIOTT, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from
the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

FILED JUL 14 1969

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July 14, 1969

US v. McLaughlin Dec 1, 1969

(i)

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STATEMENT OF THE ISSUES*

1. Whether defendant was improperly denied Fifth Amendment self-incrimination protections.
2. Whether the trial court, in allowing a retarded child to testify concerning events which happened when he was seven,

*The case has not previously been before this Court.

References and Rulings

Since this a criminal case tried before a jury, the Court wrote no opinion and made no written findings or conclusions. His charges to the jury (on February 8, 1968) are to be found in the Transcript at pp. 622-639.

Adverse rulings during the course of the trial, there excepted to and argued here on appeal, are to be found in the Transcript at pp. 68, 140-141, 153-155, 160-163, 182-186, 200, 205-208, 239, 241-242, 251-252, 427-428, 465-474, 476, 501, 575.

committed reversible error.

3. Whether, in any event, subsequent references to the little boy's "slapping" testimony, notwithstanding a prior instruction to "disregard that", constituted prejudicial error.

4. Whether the instant conviction should be set aside because the Government called as a witness to testify to the date and contents of a telephone conversation which she had allegedly had with decedent two days before the shooting, where the Government should have known that said testimony would be inconsistent with certain documents which the Government had in its possession and which it had already submitted in evidence.

STATEMENT OF THE CASE

A. Summary of the Proceedings. -- After a preliminary hearing before Judge Milton S. Kronheim, Jr. on February 17, 1967, a complaint by Officer Horace M. Parker charging that Jessie Elliott, Jr., on February 3, 1967, "with malice aforethought did kill and murder one Mildred Louise Williams", was dismissed and the defendant discharged for want of probable cause (Criminal No. US-1140-67; cf. Criminal No. 458-67, Tr. 11-13).

Although present at that hearing, the accused's nephew Keith Elliott (then seven years of age) was not called as a witness by either side (see Criminal No. 458-67, p. 6).^{1/}

Thereafter, in April 1967, on a grand jury original, Elliott was charged with second degree murder (22 D.C. Code §2403), to wit, that "On or about February 3, 1967, within the District of Columbia, Jessie Elliott, Jr., with malice aforethought, did shoot Mildred Williams, with a pistol, causing injuries from which the said Mildred Williams, did die, on or about February 3, 1967" (Tr. 11-13, 16, 18, 36).^{2/}

Following his arrest and commitment on a bench warrant in July 1967, Elliott was released on \$2500 bond. At his arraignments (on July 21 and August 17, 1967) he entered a plea of not guilty (docket entries).

The case came on for trial before Judge Joseph C. Waddy on Thursday, February 1, 1968, after two prior continuances at the request of the Government, pending the location and return from South Carolina to Washington of the accused's

^{1/} The appellant was represented at the preliminary hearing and at the trial below by King David, Esq., counsel of his own choosing, who had previously obtained for the Elliotts a four-figure settlement for injuries and hospital expenses suffered by Keith in connection with being run over by an automobile in September 1963 or 1964 at the age of three.

^{2/} The one-count indictment of April 1967 bears Foreman Swain's signature but fails to show the concurrence of 12 grand jurors as required by F.R. Crim. Proc. (Rule 6(f)). See Tatum v. United States, No. 21780 (App. D.C. April 8, 1969).

nephew, Keith Elliott, who had been living with the defendant and the decedent at the time of the shooting (Tr. 3-7). Following a trial lasting portions of five days, the jury on February 8 returned a verdict of guilty as charged (Tr. 642). Thereafter, on April 19, 1968, Elliott was sentenced to imprisonment for a period of five to twenty years (Transcript of Record).

The accused noted an appeal in forma pauperis, complaining principally of "the reception of testimony of my nephew, age 7, who, initially on taking the stand could answer no questions, but after having been secretly lodged in a hotel over a weekend, was returned to the stand and parroted answers to prosecutor's questions", and the "refusal of the Court to permit deft. to call his aunt" (Transcript of Record). The undersigned was appointed by this Court to brief the appeal for the defendant (Order of May 15, 1968). During the pendency of the instant appeal the defendant has been allowed to remain on bail (\$2500).

B. The Government's Case. -- As the Assistant United States Attorney observed in his opening statement to the jury, "this case rests on . . . circumstantial evidence" (Tr. 35). ". . . no one saw Mrs. Mildred Williams shot on February 3, 1967. . . . There was no eye witness to the shooting" (Tr. 35).

Officer Horace M. Parker testified that about 5:30 p.m. on the date in question he and Private Harris, on scout car duty, responded to a radio run for a shooting at 3253 23d St., S.E., Apt. 14 (Tr. 53-54; cf. Gov't. Ex. 2 for identification, Tr. 15). After knocking and receiving no answer at that address, he opened the unlocked door and looked in (Tr. 54). The room was filled with smoke from burning food (Tr. 54). From a bedroom off the living room he heard a man (subsequently identified as the defendant Jessie Elliott, Jr.) talking on the telephone (Tr. 54-55).^{1/} On walking into the bedroom he saw a gun on the bed which he moved "out of the way" (Tr. 55, 57),^{2/} and asked Elliott if he had called the police for a shooting and he said he had (Tr. 55, cf. Tr. 83). He "pointed over on the floor and said, she [the decedent Mildred Williams] shot herself" (Tr. 55). Looking around the bed Officer Parker "saw a female lying there in a pool of blood with a blood spot on her chest", with blood on the wall and tracked throughout much of the apartment

^{1/} Elliott was apparently talking to a girl friend of the decedent who called after Elliott had telephoned the police of the shooting (Tr. 494). The record does not further identify said person nor any res gestae comments which he might there have made.

^{2/} Later Officer Parker put the gun "back where it originally was" (Tr. 57).

(Tr. 56-57). Officer Parker thereupon "asked" Elliott "to come away from around the bed and get off the telephone" (Tr. 55; cf. Tr. 494). Elliott was told "to step into the dining area off the living room" with Private Harris (Tr. 56; cf. Tr. 495). Officer Parker then "got on the telephone" and notified his dispatcher "as to what the situation was at that time" (Tr. 56). He told Elliott to "have a seat in the kitchen until such time as the Homicide Squad detectives arrived on the scene" (Tr. 58, cf. Tr. 68, 548).

While waiting for the Homicide Squad (cf. Tr. 59), Officer Parker "had a conversation with Mr. Elliott", asking him what had happened (Tr. 59, 548). According to Officer Parker (Tr. 59),

He [Elliott] said she shot herself. And I asked him was he there at the time and he said, no. He said that he had come in from work and he had left and returned a short time later and changed clothes and was on his way out and the lady asked him if she could go with him and he said, no. And then she asked him where was he going and he said, I am going out. And she said, well, if you are going out, how about taking your son [nephew] with you. And he said, okay. He said he then took the little boy [Keith Elliott] and left the apartment and when he got into the hallway he heard a shot and went back in.

On going back in Elliott stated that he found the decedent on the floor in the bedroom, whereupon "he sent the little boy [Keith Elliott] into the kitchen to get a wet cloth and he

attempted to wipe the blood away" (Tr. 60). Prior to asking Elliott these questions, Officer Parker did not advise Elliott of his right to an attorney or his right to remain silent (Tr. 67-69).

Shortly thereafter two other detectives (Goodall and Hardy) arrived on the scene (Tr. 62, 73-85), followed a few minutes later by Detectives Spencer and Ruiz of the Homicide Squad (Tr. 62, 82). After checking the body and talking to Keith, who had been sent across the hall to a neighbor's apartment (Tr. 62, 82, 86, 140, 189, 198, 503), defendant was placed under arrest by Detective Ruiz (Tr. 140, 190, 196). He was ordered to remove and turn over to the police his blood-stained trousers and shoes (Tr. 125, 139, 140, 197, 205; cf. Gov't. Exs. 4, 15). At all times the defendant was cooperative (Tr. 149). He had not been drinking (Tr. 64). After being formally placed under arrest, but not previously, he was shown a "warning of rights" card by Detective Ruiz (Tr. 190, 198, cf. Tr. 197).

The gun which was on the bed when the officers arrived at the apartment and which defendant admitted was his and which he had picked up and placed there (Tr. 325, 330, 361), was subsequently checked by the FBI (Tr. 271). No latent

fingerprints of value for identification purposes (either those of the defendant or the decedent or a third party) were found thereon (Tr. 271, 273). From ballistic tests the FBI could not say that the slug taken from the body of the decedent, the sole shot fired (Tr. 88), came from the gun in question (Tr. 314, 319).

At the preliminary hearing before Judge Kronheim, the Government did not call young Keith,^{1/} defendant's 7 year old nephew, who was allegedly watching television in the living room of the apartment at or about the time of the shooting -- though he had been interviewed by Detective Ruiz shortly after that event (cf. Gov't. Ex. 20 for identification). At the instant trial, he and an aunt with whom he had been living in South Carolina, were returned under subpoena to Washington (cf. Tr. 3-7). When first called to the stand on Thursday afternoon, February 1, 1968, and examined as a minor child on voir dire before being sworn, he gave his name and age (then eight), and then "clammed up" with respect to all subsequent questions -- where he then lived, whether he had any brothers or sisters, whether he was going to school,

^{1/} See preliminary hearing in Criminal No. US-1140-67 (February 17, 1967), and particularly p. 6 where Keith was excluded from the courtroom. In the copy of the preliminary hearing used in the instant trial to impeach the defendant, Officer Parker's testimony was not transcribed. Undersigned subsequently procured a copy of Parker's statement at the preliminary hearing from Court Reporter Perkins.

whether he came to Washington by train or bus, etc. (Tr. 70-73, 281). At that point, at the Government's request, he was "excused" (Tr. 72), later characterized as "withdrawn" (Tr. 73).

However, when recalled over defendant's objections (Tr. 153-155) to the stand on Monday, February 5, 1968,^{1/} he answered these questions and others, stating that he was in the first grade (Tr. 156), that he went to a brick school, lived in a home made of wood, and knew it was "bad" to tell a lie (Tr. 156), that you "get a beating" when you do (Tr. 156). He did not know why he would get a beating for telling a lie (Tr. 167). In response to questions by the Court, Keith stated that he did not know what "you do when you swear to tell the truth", that he did not know the meaning of an oath (Tr. 157-158), that he never went to Sunday School or church, (Tr. 160, 162), and that he was then living with an aunt in South Carolina (Tr. 157-158). In support of his objections to Keith's competency to testify, defendant's counsel offered to show that in September 1963 "this child was very seriously injured in an automobile accident. . . . For many months or weeks after that he was hovering between life and death"

^{1/} Because the Court sat on Motions on Friday, the trial had been recessed from Thursday to Monday (Tr. 112).

(Tr. 160-161); that he spent considerable time in the hospital; that he suffered a concussion; that a woman whom he called mother (Mary Elliott) "wanted to put him away" because she believed him "emotionally disturbed" (Tr. 160-163).

Called as a witness on this point, out of the presence of the jury (Tr. 172), Mary Elliott testified that Keith, on a Labor Day in 1963 or 1964, at the age of two or three (Tr. 174), "had a car accident. He was struck by a car and had a fractured skull. He was hospitalized and unconscious for a long time. He stayed on the critical list quite some time and stayed in the hospital . . . [six] months" (Tr. 172, 174). Thereafter, she "had a lot of trouble with Keith and we concluded that it was due to the accident. He had a fractured skull and he was very slow" (Tr. 172). He didn't "mature as the other children" (Tr. 180). "He has gotten better some but not just really normal" (Tr. 173, cf. 178)^{1/}, "doesn't know right from wrong" (Tr. 178). She didn't believe he knew why he was punished for lying (Tr. 179).

After the trial judge concluded that Keith was competent to testify in this case (Tr. 184, 185), Keith stated in response

^{1/} Though he was sent to school at five (Tr. 172, 174), he was still in the first grade when he testified in this proceeding at the age of eight (Tr. 180, 237), at a time he should have been in the third grade (Tr. 180).

to questions by Government counsel that he was on a long ("lawn") chair in the living room watching television when "Mildred was shot"; that Jessie and Mildred were in the bedroom; that he "heard a shot" (Tr. 238-239). To the leading question "what did you hear before the shot?", the little boy said, "He slapped her first" (Tr. 239). Defense counsel asked that this question and answer be stricken since Keith was "not in the room with the other two parties" (Tr. 239; cf. Tr. 242) -- with the door either shut or the room out of his line of vision (Tr. 239). Stating that the answer was in response to the question "what he heard", the Court first overruled the objection (Tr. 239). Though asserting that Jessie had said something prior to the shooting (Tr. 240), Keith twice stated that he "didn't remember what he said" (Tr. 240, 241).^{1/} After Keith was asked whether he had heard any other noise in the bedroom, "besides the slap and the shot" (Tr. 241), defense counsel renewed his objection, and the Court ultimately ordered the answer "he slapped her" stricken, with the jury instructed to "disregard that" (Tr. 242).^{2/}

^{1/} Later, he testified he heard the defendant say, "if you holler I will shoot, and she hollered and he shoot" (Tr. 242).

^{2/} Notwithstanding this ruling, in arguing against a motion for a directed verdict of acquittal (Tr. 420), Government counsel again referred to Keith's statement that, while in the dining room, he "heard a slap" in the bedroom (Tr. 438). The trial judge likewise referred to this testimony in turning down a defense motion for a directed verdict (Tr. 440). And in his closing argument to the jury, the Assistant U.S. Attorney again made reference to Keith's statement (Feb. 8, 1968, pp. 20, 29). In an effort to deemphasize this testimony, counsel for the defendant pointed out in his closing argument that the little boy was not in the bedroom immediately prior to the shooting, and couldn't have known who slapped whom (p. 52).

Apparently to negative the accused's statement to the police that the decedent had committed suicide, Government counsel called the coroner who testified that the path of the bullet was from front to back (left side) and downward to the fifth rib two inches from the backbone on the left side (Tr. 222-223) -- a path which counsel for the Government subsequently argued (though not impossible in the case of a self-inflicted wound), would be unusual for a right-handed person (Tr. 440; Closing Argument pp. 13-15, 46-47).

Other witnesses testified that the decedent had a morbid fear of guns (Tr. 346, 374, 401). Two of decedent's women friends testified to prior threats allegedly uttered by the accused concerning what would happen if the decedent ever left him (Tr. 381, 402).

A billfold of the deceased containing two clippings of "apartments for rent", various telephone numbers, appointment cards, driver's license, etc. was received in evidence (Tr. 381, 388, 394). Much was made of the two clippings of apartments for rent as an indication that Mildred was planning to leave the accused at the time of her death and as proving "malice". (Tr. 393, 394). A card tucked away in the billfold (Gov't. Ex. 23) showing an appointment by the deceased with a Dr. Williams, a neuro-psychiatrist for January 30, 1967 went unmentioned.

C. The Defendant's Case. -- An effort by counsel for the defendant to place before the jury (through Mary Elliott and Jessie Elliott) information concerning the automobile accident which Keith suffered at the age of three, and the impact on the child, so that the jury might better conclude how much credence should be given his testimony, was objected to by the Government and sustained by the Court and duly excepted to (Tr. 465-474, 501; cf. Tr. 251-252). An effort to show certain inconsistencies between Officer Parker's written report and his subsequent oral testimony, by placing his Jencks Act statement in evidence (Gov't. Ex. 2 for identification), was also rejected by the Court (Tr. 476).

The defendant, who had had no serious earlier brushes with the law (Tr. 456-461), testified in his own behalf (Tr. 478). He stated that he was born and brought up in South Carolina where he finished the ninth grade of school (Tr. 479). He came to the District in late 1958 (Tr. 481). At the time of the shooting (February 3, 1967) he was 32 years of age (Tr. 455, 481), the decedent was 39 (Tr. 221). During the years which intervened between coming to the District and the shooting in question, the defendant was steadily employed in unskilled jobs (Tr. 481-482, 505, 510-511). On February 3, 1967, he held two jobs, one with the Sanitation Department for the

District of Columbia (which he had held for five years), and a part time job at a gasoline service station in Southeast Washington which he had had for a year and a half (Tr. 486-487, 505, 510-511, 521).^{1/}

On the day Mildred "met her death" (Tr. 488), the accused had worked his full hours on his regular job with the Sanitation Department (Tr. 488). He went home that afternoon and cleaned up, preparatory to going out to play pool with his first cousin, George Elliott (Tr. 488). Mildred asked to go out with him, to which he said "no" (Tr. 489, 535, 537), whereupon he was told to take Keith with him (Tr. 489, 535, 538). As he and the little boy were leaving the apartment, he heard a gunshot (Tr. 490, 534, 540). He thereupon "turned around from the front door, walked into the bedroom, and saw Mildred sliding down beside the wall, blood coming out of her nose and mouth" (Tr. 490, 492, 541), with his gun "in her right hand" (Tr. 494, cf. Tr. 543-544). He called the police (Tr. 491, 494, 495) and sent Keith to get cousin George Elliott (Tr. 495, 502), who worked at the same service station the accused did (Tr. 495).

^{1/} Though appellant lost his civil service job with the District after the shooting (Tr. 645), he has been steadily employed while on bond awaiting the outcome of the instant appeal.

The defendant denied shooting the deceased (Tr. 498). He denied slapping her (Tr. 498). The two of them had been living together approximately a year and a half at the time of the shooting (Tr. 498).

Defendant explained the newspaper clippings showing apartments for rent by stating that "both of us was intending to move because Keith was there and he needed a bedroom for hisself" (Tr. 484-485, 514). Despite her alleged fear of guns, Mildred regularly placed his clean clothes (after washing them at the laundramat) in the bureau drawer on top of the gun (Tr. 499).

In his charge to the jury (Tr. 622-629), an instruction was given, but not excepted to, that the jury could consider "the evidence of your own observations and experience in the affairs of live." See United States v. Jacobs, No. 22,336 (U.S. App. D.C. June 25, 1969).

ARGUMENT

I

Defendant Was Improperly Denied Fifth Amendment Self-Incrimination Protections

The subsequent use at a trial of admissions and other incriminating statements obtained by the police, in advance of required warnings, while interrogating a prime suspect,

is a flat violation of the Self-Incrimination Clause of the Fifth Amendment. Miranda v. Arizona, 384 U.S. 439 (1966); Mathis v. United States, 391 U.S. 11 (1968); Orozco v. Texas, 37 L.W. 4260 (March 25, 1969).

If Miranda stood alone, it could be distinguished from the instant situation on the ground that Elliott himself called the police, that the interrogation was conducted in familiar surroundings (in the apartment where he had been living), that the incriminating statements were elicited before he was formally arrested, and that warnings concerning an accused's Fifth Amendment rights are not required prior to an actual arrest or detention. Cf. Hicks v. United States, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967).

But Miranda does not stand alone. Instead of subsequently restricting the pronouncements there made, the Supreme Court has since gone further -- in Mathis and Orozco, as Justices Harlan, White, and Stewart noted in concurring and dissenting statements in those cases. It can no longer be contended, in the light of these two later decisions, that Miranda is confined to interrogations at a police station. It covers interrogations, as here, at one's own abode (Orozco). And Miranda as construed in Mathis, makes it clear that damaging statements elicited without the required advance warnings are not admissible in a subsequent criminal proceeding, even though made in the course

of a routine civil tax investigation with the accused not "in custody" for any tax violation at that time. Nor can it be contended, in the light of Mathis, that a need for a Miranda warning, if statements during the course of police interrogation are to be subsequently used at the trial, does not arise until one is formally placed under arrest for the crime in question.

Thus, the basic premise of this Court's 1967 decision in Hicks, supra, at p. 212, that incriminating statements by a person before he is placed "under arrest" are admissible, even in the absence of a Miranda warning, is highly questionable in the light of Mathis (1968) and Orozco (1969), where convictions were reversed for statements made by a suspect, without the requisite prior warning, at a time his freedom of action was partially circumscribed, even though he was not then under formal arrest. On this point, Miranda is specific, a fact noted by Justice Black in Orozco, where he stated (37 L.W. 4261): "The Miranda opinion declared that the warnings were required when the person being interrogated was in custody at the station or otherwise deprived of his freedom of action in any way, 384 U.S. 436, 477-478" (emphasis supplied by Justice Black).

It is clear from the instant record that Elliott's freedom of action was curtailed in this case from the moment that

Officer Parker and Private Harris arrived at the scene of the shooting (see Statement of Facts, supra, pp. 5-7).^{1/} Here, when Officer Parker arrived, with Elliott the only adult at the scene,^{2/} he "asked" Elliott to get off the phone, leave the bedroom and step into the dining area with Private Harris (Tr. 55). After putting in a call for the Homicide Squad, and apprising the dispatcher "as to what the situation was at that time" (Tr. 56), he told Elliott to "have a seat in the kitchen until such time as the Homicide Squad detectives arrived on the scene" (Tr. 58; cf. Tr. 68). Accordingly, while waiting for their arrival, Officer Parker proceeded to have a "conversation" with Elliott, asking him what happened (Tr. 59). At the trial, Officer Parker detailed to the jury the statements thus elicited, (supra). At no time did Officer Parker advise Elliott of his right to counsel and of his right to remain silent (see Tr. 68-69). Under Miranda and its progeny, the accused's responses to questions by Parker were thus inadmissible. His answers, as recalled by Parker, differed in various particulars from his subsequent testimony in court, thus greatly

^{1/} Objections by the Government to efforts by defense counsel to show in what respects the accused's "freedom of action" was circumscribed prior to his arrest were erroneously sustained by the Court (Tr. 68, 199-200, 205-208; cf. Tr. 575).

^{2/} As noted by the police officer in Hicks, generally everyone found on the scene of a homicide is deemed a "suspect" until he exculpates himself (127 U.S. App. D.C. at p. 211).

affecting his credibility in the eyes of the jury (cf. Tr. 42-43, 302, 329, 335, 363-364, 422, 548-549, 554, 568; Closing Argument pp. 21-23).^{1/}

Although here denying that he had placed the defendant under arrest, and asserting that the actual arrest was thereafter made by Detective Ruiz, Officer Parker assessed the situation more candidly at the preliminary hearing on February 17, 1967 (Criminal No. US-1140-6, see Appendix A, p. 6):

Q Did you place the defendant under arrest?

A I placed him under arrest -- well, he was placed under arrest formally by Detective Ruiz of the Homicide Squad and advised of his rights.

Q Will you answer the question? Did you place him under arrest?

A No, sir, not formally.

II

In Allowing Keith to Testify the Trial Court Committed Reversible Error

With no federal statutes on the point, the applicable law in felony cases in the District of Columbia, on the matter of

^{1/} Government counsel throughout the trial made much of these alleged inconsistencies. Not dissimilar differences can be found in Officer Parker's report of the shooting (Gov't. Ex. 2 for identification), his testimony at the preliminary hearing (see Appendix A, pp. 1-7); and his testimony in the instant proceeding (Tr. 52-69).

the competency of youthful witnesses, is the common law as construed by the Federal Courts (Rule 26, Fed. Rules of Crim. Proc). The competency of a child to testify "rests primarily with the trial judge", unless his action was "clearly erroneous". Wheeler v. United States, 159 U.S. 523, 524-525 (1895); see also Beausoliel v. United States, 71 U.S. App. D.C. 111, 113, 107 F.2d 292, 295 (1939). Here the error is clearly manifest, and there was thus an abuse of discretion by the trial judge.

Although Beausoliel gives the trial judge great leeway it is to be noted in that case that this Court did not have the record of the voir dire before it. Here, this Court has the complete record below, where the first time the child was called and placed on the stand he gave his name and age, and supplied nothing further to indicate he was in any respect a competent witness. Then after a long weekend at a hotel and several conferences with the U.S. Attorney's office (Tr. 256-257), and receiving new clothes (Tr. 249), he parroted answers to pertinent voir dire questions. When asked questions by the trial judge and by defense counsel on matters not previously covered, his answers came through less clear (cf. Tr. 242-243, 245, 251, 252, 254, 259-260, 262).

The fact that the Assistant U.S. Attorney, in his opening statement to the jury made no mention of this youthful witness (Tr. 34-46, 437), and that he was not used at the preliminary hearing before Judge Kronheim (Criminal No. US-1140-67) shows that even Government counsel had reservations concerning his competency and a doubt whether he would be allowed to testify, a doubt he subsequently conceded (Tr. 437). And the trial judge himself was seriously troubled on this score (Tr. 170).

When coupled with testimony by Mary Elliott, who was taking care of the boy at the time of the accident and skull fracture, and for sometime thereafter (supra, pp. 10, 13) the reasons for such doubt are apparent. And in this connection, though the boy started school at the age of 5, it is highly significant that he was still in the first grade some 3 years later when he testified in this proceeding in February 1968 at the age of 8 -- with nothing to indicate that the boy had missed any substantial time from school during those 3 years.

The little boy had had no religious training. While he had received beatings for previous falsehoods, assurance that no harm would befall him for testifying removed any such "sanctions" here. On cross-examination he admitted he didn't know "what the truth is about this shooting" (Tr. 258).

A defendant is unreasonably prejudiced when the only witness who links him with the alleged crime is a child of tender years whose competency is questionable, a fact of which the jury in this case was totally unaware (cf. Tr. 427-428). Attempts to advise the jury of the seriousness of the brain concussion Keith suffered at the age of three were objected to by the Government and sustained by the court (supra, p. 13). Just as psychiatric testimony is admissible to impeach credibility, so is evidence of brain concussion. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950). In that case, just as evidence "of insanity is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility", so should the matters which defense counsel sought to place before the jury through Mary Elliott and Jessie Elliott, points duly preserved by defense counsel.

That Keith's observations were not too reliable is apparent from his Jencks Act statement to the police (Gov't. Ex. 20 for identification). There he stated that he heard "two shots". It is elsewhere uncontradicted that only a single shot was fired -- with six live rounds still in the chamber and one expended round under the hammer of the seven-shot revolver

Tr. 88, 92, 123, 129; Gov't. Exs. 3, 5-7, Tr. 89, 92-93).

This discrepancy was nowhere brought out on cross-examination or otherwise. Through a mix-up counsel for the defendant did not have a copy of a Jencks Act statement by Keith at the time he cross-examined the little boy (Tr. 328).

III

The Slapping Testimony and Subsequent References Thereto Were Highly Prejudicial

Even if Keith were deemed competent to testify, the "slapping testimony" and subsequent references thereto, after the jury was told to "disregard that", were highly prejudicial. To the question "what did you hear before the shot", the little boy said "He slapped her first" (Tr. 239).^{1/} Since he was not in the bedroom, and couldn't see into the bedroom, defense counsel asked that the question and answer be stricken (Tr. 239). The trial court aggravated matters at that point by overruling this objection (Tr. 239). However, when the Assistant U.S. Attorney followed up with the question what other noises he heard in the bedroom "besides the slap and the shot", defense counsel renewed his objection (Tr. 241-242). The Court ultimately ordered the answer "he slapped her" stricken, and instructed the jury, to "disregard that" (Tr. 242).

^{1/} Emphasis supplied.

Whether this brief instruction would have cured the damaging impact of the statement on the jury, had the matter not again arisen, we can only surmise. But that the matter wasn't thereby erased from the judge's mind and the Government's mind is quite apparent from the instant record. Notwithstanding the judge's ruling, in arguing against a motion for a directed verdict of acquittal (Tr. 460), Government counsel again referred to Keith's statement that, while in the dining room, he "heard a slap" in the bedroom (Tr. 428). The trial judge himself mentioned this testimony as a reason for rejecting defendant's request for a directed verdict (Tr. 440). And to compound the errors still further, Government counsel again referred to the "slapping testimony" in his closing argument to the jury (February 8, 1968, pp. 20, 29). Apparently realizing that another objection at that point would have done no good, counsel for the defense in his argument to the jury likewise went into the slapping testimony, pointing out that Keith (in the living room) couldn't have known who slapped whom in the bedroom (Closing Argument, Feb. 8, 1968, p. 52). With other participants continuing to refer to such testimony, the trial judge's earlier brief instruction to the jury to "disregard that" could not have cured its damaging impact.

IV

The Government Should Not Have
Called Bertha Gaither As A Witness

Mrs. Bertha L. Gaither, a sister-in-law of the decedent, and a key witness for the Government (cf. Tr. 46, and Closing Argument, Feb. 8, 1968, pp. 19, 24), gave Detective Ruiz a statement in connection with this case on February 12, 1967 (Gov't. Ex. 26 for identification). In that statement and thereafter at the trial, she stated that Mildred had telephoned her on Wednesday, February 1, about 6:00 p.m. (two days before the shooting)^{1/}, and she "heard Jessie hollering in the background", and saying "if you leave I will kill you" (Tr. 401-402; cf. Tr. 46).

Her Jencks Act statement was even more specific on this and other matters (Gov't. Ex. 26 for identification):

It was about 6:00 p.m. or 7:00 p.m., on Wednesday, Feb. 1st, 1967, I answered my phone and it was my sister-in-law, Mildred Williams calling. She asked what I was doing and was I busy and I told her, 'Nothing, what do you want.' She told me that she was calling to see if I knew a Psychiatrist or if I could recommend one. She told me that Jessie was acting real crazy and she wanted to take him to a psychiatrist. I told her I knew a Dr. Williams, he was a nerve specialist but I wasn't sure whether he gave psychiatric treatment. I could hear him in the background hollering and Mildred asked me if I could hear Jessie hollering and I told her yes. Then I heard Jessie saying, 'Mildred who are you talking to now, put that phone down, because I will say, if you leave I'll kill you.' While he was hollering

^{1/} This point was much emphasized by the Assistant U.S. Attorney in his Closing Argument to the jury on February 8, 1968 (pp. 19, 24).

he was using curse words and because of my faith I do not wish to repeat these curse words. I asked her if she wanted me to talk to 'Rob' (Robert Gaither) about a psychiatrist for him. Mildred asked me not to mention anything about Jessie needing a psychiatrist to her brother Robert Gaither. She then told me she would call me back later, and I told her if she didn't call I would call her.

Thereafter, Jessie Elliott denied on direct and again on cross (Tr. 487, 514, 546-547) that he was at the apartment at the time and on the date in question (at 6:00 p.m. on February 1, 1967), statements which the jury no doubt disbelieved.^{1/} However, other exhibits vouched for by the Government and received in evidence (Gov't. Ex. 23) cast grave doubts on the accuracy of Mrs. Gaither's sworn statement to Detective Ruiz (Gov't. Ex. 26), and her asserted February 1 conversation with Mildred (Tr. 401). There, because "Jessie was acting real crazy", Mildred allegedly telephoned her sister-in-law on February 1 for the name of a psychiatrist. Mrs. Gaither recommended a Dr. Williams. (We repeat that Mrs. Gaither twice stated that this conversation took place on February 1, 1967, two days before the shooting (Gov't. Ex. 26 and Tr. 401). Yet Mildred's billfold and its contents (received in evidence as Gov't. Ex. 23) contains an appointment

^{1/} The accused on cross-examination named two persons who allegedly saw him at the service station on Wednesday evening (Tr. 547). Neither were produced by the Government on rebuttal.

card, showing an appointment she apparently had with "E.Y. Williams, M.D. Neuro-Psychiatrist" for "January 30 [1967] 7 p.m." -- two days before the alleged date of Mrs.

Gaither's conversation with Mildred!

If the jury had been apprised of the fact that Mildred had arranged an appointment with Dr. Williams for January 30, (for herself or Jessie -- we know not which), said fact would have wholly discredited Bertha's positive assertions that Mildred had called her about a psychiatrist on February 1 and that she had recommended Dr. Williams in the course of the conversation; and what is more important it could well have cast doubt on Mrs. Gaither's testimony concerning that conversation and the threats allegedly overheard at that time.

Government counsel no doubt failed to note the blatant inconsistency between Mrs. Gaither's statement to Detective Ruiz (Gov't. Ex. 26) and the appointment card which was part of the packet of notes and cards received in evidence as Gov't. Ex. 23). That counsel for the defendant, who did not see Gov't. Ex. 26 until after Mrs. Gaither testified on direct, nor Gov't. Ex. 23 until after it was placed in evidence did not in the midst of the trial observe this discrepancy is not important. Whether Mildred kept the January 30 appointment, whether she visited a psychiatrist for

herself (rather than for the accused), and whether any such conversation with Mrs. Gaither ever took place are matters which the Government should have explored. Until those discrepancies were explained, the Government should not have used the decedent's sister-in-law as a witness.

CONCLUSION

For the reasons here stated the conviction and judgment of the court below must be reversed, with the case remanded for further proceedings not inconsistent herewith.

Respectfully submitted,

By Vernon L. Wilkinson
Vernon L. Wilkinson

Attorney for Appellant
(Appointed by this Court)

July 14, 1969

IN THE COURT OF GENERAL SESSIONS FOR THE DISTRICT OF
COLUMBIA

Criminal Division

----- x
:
UNITED STATES :
:
vs. : Criminal No. US-1140-67
:
JESSE ELLIOTT, JR., :
:
Defendant. :
:
----- x

Friday, February 17, 1967.

Preliminary Hearing in the above-entitled cause
came on before Judge Milton S. Kronheim, Jr. in Court room
No. 14, at 1:30 o'clock p.m.

APPEARANCES:

On Behalf of the Government:

Mr. David Woll, Assistant United States
Attorney.

On Behalf of the Defendant:

Mr. King David.

P R O C E E D I N G S

EVIDENCE ON BEHALF OF THE GOVERNMENT

HORACE PARKER

was called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Woll:

Q Officer, will you state your name, rank and duty assignment?

A Horace Parker, Private, Metropolitan Police Department, assigned to the 11th Precinct.

Q Officer Parker, directing your attention to Friday, February 3, 1967, were you on duty on that date?

A I was.

Q Directing your attention to the time 5:39 p.m. on that date did you receive a radio run for a shooting at 3252 23d Street, South East?

A I did.

Q What did you observe on arriving at the scene?

A On arriving upon the scene-- it was Apartment 14-- I knocked on the door. There was no response. I could hear someone inside talking so I opened the door and walked in. I didn't see anybody in the living room but I could hear someone talking in the bed room. I walked back into the bed room and I observed the defendant here talking on the telephone. I

asked him did he call--

Q For the record, please point out to whom you are referring.

A Mr. Elliott, which is the defendant there (indicating)

Q Let the record show the witness is pointing to the defendant. Will you continue?

A I asked him did he call. He said, "Yes," and pointed to the floor and said, "She shot herself." He continued to talk on the telephone. I looked around the bed, I couldn't see whom he was talking about, at that time. So I walked to the foot of the bed, I looked around and I could see a female lying on the floor in a pool of blood. So I asked him to get off the telephone and come around the bed, which he did.

Q= Did you make any observations concerning any weapons?

A Yes, sir, there was a gun, a silver plated revolver, laying on the bed.

Q Did you recover the gun?

A I did.

Q What kind of a gun was it?

A A .22 caliber long belt revolver. The gun is now at the FBI Lab for ballistic tests and fingerprints.

Q Did you ask him where he got the gun?

A I asked the defendant whose gun it was. He admitted it was his, and he had bought it about a year ago from a fellow

on the street, unknown to him.

Q Did you examine the body on the floor?

A Yes, I did. I briefly examined it.

Q From what you saw you made observations?

A Yes.

Q Did you ask the defendant about himself and why he was there?

A Yes, sir, I did.

Q What did you find out in this way?

A He said that he was the common law husband and that she had she had shot herself as he was leaving the house. I told him to sit down to await the arrival of the Homocide Squad.

Q Was there anyone else in the building or in the premises itself?

A Not at that time. Approximately two or three minutes after arriving on the scene Mr. George Elliott and Keith Elliott entered the apartment I asked them what their capacity was and I was told that Keith was a son of the decedent and Mr. Jesse Elliott there. I asked had they been there. He said Keith--- Mr. George Elliott told me Keith had come around to the service station to get him after this shooting.

Q How old was Keith?

A Seven years old. I asked him if he had any place to take Keith at that moment to get him out of the apartment until we could finish our investigation.

Q Did there come a time when other police officers arrived on the scene?

A Yes, our Precinct Detective Homicide Squad, Detective and Precinct officials, arrived on the scene. I explained to them what I knew about the case and what I had observed when I entered the apartment, and they carried on the investigation.

Q Were you there during the course of their investigation?

A I was.

Q Did you hear them question Keith?

A Yes, I did.

Q What did you hear Keith tell them concerning the affair?

A Keith said he was sitting on the couch and his father and mother were in the bed room and he heard his father slap his mother and tell her if she screamed he was going to shoot her. He then heard a shot and he went into the bed room and he saw his father and mother there. His father told him to get a wet rag. Then his father sent him to summon his cousin.

Mr. Woll: That is all the questions I have of this witness.

CROSS EXAMINATION

By Mr. David:

Q Officer, did you so testify you heard him tell the

other officers that his father slapped his mother?

A Yes, I did.

= Q When did this questioning take place?

A It took place at the apartment and it took place at the Homocide Squad.

Q Were you present both times?

A I was.

Q Did you place the defendant under arrest?

A I placed him under arrest-- well, he was placed under arrest formally by Detective Ruiz of the Homocide Squad and advised of his rights.

Q Will you answer the question? Did you place him under arrest?

A No, sir, not formally.

Q Did you hear during the interrogation of Keith, did you hear whether or not he was asked was he in the room where the woman was who was shot or where his daddy was?

A He was asked where was he.

Q Did he say where he was?

A Yes, he said he was sitting on the couch.

Q Where was the couch?

A In the living room.

Q Where was his mother and father?

A In the bed room.

Q Did anything come out that you heard that the woman

had ever been in the living room?

A No, sir.

Mr. David: I have nothing further.

Mr. Woll: I have nothing further.

(The Witness left the stand.)

- - - - -

REPORTER'S CERTIFICATE

I, Edwin S. Perkins, an official reporter for the Court of General Sessions for the District of Columbia, do hereby certify that the foregoing is the official transcript of testimony of the witness Horace Parker in the preliminary hearing of the above-entitled cause.

Edwin S. Perkins
Official Reporter.

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ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the police were required to inform appellant of his *Miranda* rights at the initial stages of a general investigation, which was conducted at appellant's request prior to that point in time when the police had reason to suspect appellant of committing the crime?

2. Whether the trial judge abused his discretion in determining that an eight year old boy was competent to testify?

3. Whether appellant was prejudiced by the Government's reference during summation to a slapping incident which counsel for appellant not only failed to object to, but to which he also made reference during his own summation?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,933

JESSIE ELLIOTT, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment dated April 17, 1967, appellant was charged with second degree murder.¹ At trial on February 1, and 5 through 8, 1968, before United States District Judge Joseph C. Waddy, sitting with a jury, appellant was found guilty as charged. On April 19, 1968 appellant received a sentence of five to twenty years. He now brings this appeal.

¹ In violation of 22 D.C. Code § 2403.

Government's Case

Officer Horace Parker testified that on February 3, 1967, about 5:30 in the afternoon, he and Officer William Harris responded to 3253 23rd Street, S.E., Apartment 17. Officer Parker knocked on the door, and when no one answered he entered an apartment full of smoke which smelled like burnt food (Tr. 53-54). As he entered the living room he heard a voice from the bedroom. He went through the bedroom door and saw appellant talking on the telephone across the bed from the door:

"I saw Mr. Elliott standing talking on the telephone and he was across the bed from me and there was a gun on the bed. I walked into the room and moved the gun out of the way and asked him did he call the police for a shooting and he said, yes, and he pointed over on the floor and said, she shot herself. And I asked him to come away from around the bed and get off the telephone" (Tr. 55).

At that point Officer Parker looked around the bed and saw a female lying unconscious in a pool of blood (Tr. 58). He asked appellant to step into the dining area off the living room with Officer Harris, and then notified the dispatcher of the situation (Tr. 56).

Officer Parker then asked appellant to have a seat in the kitchen, and after turning off the stove and opening a window to let the smoke out, he inquired of appellant what had happened:

"He said she shot herself. And I asked him was he there at the time and he said no. He said that he had come in from work and he had left and returned a short time later and changed clothes and was on his way out and the lady asked him if she could go with him and he said no. And then she asked him where he was going and he said, I am going out. And she said, well, if you are going out, how about taking your son with you. And he said, Okay. He said he then took the little boy and left the apartment and when he got into the hallway he heard a shot and went back in" (Tr. 59).

Appellant told Officer Parker he opened the door to get back in the apartment and found the decedent on the bedroom floor. (Tr. 60). On cross examination Officer Parker testified appellant did not appear to have been drinking (Tr. 64). He said that he did not place appellant under arrest (Tr. 68).

An eight year old boy named Keith Elliott took the stand, but after stating his name and address refused to answer any further questions. The court and counsel unsuccessfully attempted to talk to the boy out of the presence of the jury and the Government withdrew him as a witness at that time. (Tr. 70-72).

Detective Leo Spencer of the Homicide Unit of the Metropolitan Police Department testified he arrived at apartment 14 at 3253 23rd Street, S.E., made a visual observation of the scene and notified the Identification Bureau, which had the apartment photographed (Tr. 85-87).

Detective Antonio Ruiz of the Homicide Unit of the Metropolitan Police Department testified that he arrived at 3253 23rd Street, S.E., with Detective Spencer. After looking into the bedroom he asked the uniform officer if there had been any witnesses in the apartment at the time that decedent had been shot. Then he went into the apartment across the hall and interviewed the little boy Keith. Following that, Detective Ruiz returned to apartment 14, introduced himself to appellant and advised appellant he was being placed under arrest (Tr. 188-190). At this time appellant was warned of his rights to have counsel (Tr. 190-191).

Dr. Richard Whelton, Coroner of the District of Columbia, testified he performed an autopsy on the body of decedent, Mildred Williams, who was identified to him by Robert H. Gaither, her brother, and a Doris Watts, her sister (Tr. 231-232). Death was from blood loss due to a gun shot wound (Tr. 222), which, in Dr. Whelton's opinion, was not a contact wound (Tr. 223-224).

Competency Hearing

The Government declared its intention to have Keith Elliott again testify as a witness, and, after objections by appellant, the trial judge decided to hold a hearing to determine whether the boy was qualified to testify (Tr. 153-154). In response to questions, Keith Elliott said he was eight years old, in the first grade, went to a school made out of brick and lived in a wood house (Tr. 155-156). He said he knew what it was to tell the truth and to tell a lie, that it was bad. He said he had told a lie before, but that he was going to tell the truth that day. He testified that when one lies "you get a beating". (Tr. 156). Keith further testified in answer to questions by the court that he knew what it was to swear to tell the truth, but that he didn't know "what you are doing when you swear to tell the truth" (Tr. 157). After arguments of both counsel and proffer of counsel for appellant that the boy had been involved in an automobile accident in 1963, which might have resulted in a head injury and caused other emotional problems, the court asked the boy to take the stand again. The court asked Keith Elliott additional questions with respect to his testifying in court, about appellant shooting the decedent, his being beaten when telling lies, and whether he would tell the truth about appellant and the decedent, to which he answered he would (Tr. 164-170).

Mary Elliott then testified out of the presence of the jury that Keith had been in an accident where he suffered a fractured skull and had been unconscious and hospitalized for a long time. This occurred when he was approximately two years old (Tr. 172, 174). She also testified that she had trouble bringing up Keith after the accident, in that he was slower than her own children. After April of 1966 Keith went to live with appellant, and Mrs. Elliott subsequently saw very little of him (Tr. 175-177).

At the conclusion of the competency hearing, the trial judge ruled that Keith Elliott was competent to testify as a witness:

The case you referred to, *Beausoliel v. United States*, 71 App. D.C. 111, sets forth the test. And it is that test that we must use in determining the capacity of this child to testify. At the outset, I would say that the court recognizes that brain damage can result from being in an accident such as has been described. But I must apply this test based upon my observations of the child in court and try and come to an informed opinion concerning his present capacity to testify rather than the capacity to testify at the time he was injured or shortly thereafter.

The *Beausoliel* case says that the proper test in determining the qualification of such a witness is not whether he believes in the devil or that liars will be punished after death, but whether the child has sufficient intelligence to have a just appreciation of the difference between right and wrong and the proper consciousness of the punishment of false swearing. And then the case proceeds: "This has been otherwise expressed, i.d., by an eminent text writer as follows"—referring there to Wigmore—it sets out the following:

First, the capacity of observation is the first of the essential requirements. Certainly, it appears to this court that this child does have the capacity to observe and did have the capacity to observe at the time of the alleged events in this case.

Second, the capacity of recollection as an essential requirement. The court inquired of the child witness as to whether or not he knew why he was here. And he said that it was something between Jessie Elliott and Mildred that he saw and heard and that he remembered. And he was able to talk about it as he was asked about it, that he was able to answer questions.

This would bring us to the third one, the matter of communication, the capacity to communicate. Now, he certainly showed that he was able to communicate and express himself rather clearly when he wanted to talk. There were times when he preferred to whisper but, certainly, he was able to talk and to talk intelligently. He understood the questions that

were asked him and when a question was asked that he didn't understand, like when I asked him whether he understood the nature of an oath, the answer was in the negative. It showed he had an appreciation of what was being said to him but, also, to me a sense of truthfulness because he could have easily said yes, I understand it, but he truthfully said, I think, that he did not know the meaning of the word oath. And he indicated a sense of moral responsibility in that he recognizes that something unpleasant is going to happen to him. He used the term beating if he tells a lie; and he knows that a lie is wrong and the truth is right.

By this test given in this case, the court feels that there is a showing here that this child witness is able to testify in this case.

Do you have anything further? It has just been handed to me—*Doran v. United States*, which is a criminal case at 92 U.S. App. D.C. 305. There the court said there is no rule of law in the District of Columbia which conclusively presumes that a child under a certain age lacks the capacity to testify. The competency of a child is a matter within the discretion of the trial judge and his discretion will not be disturbed unless clearly erroneous, citing *Wheeler v. United States* and *Wigmore*, for he is in a better position than any appellate tribunal to consider and weigh all of the factors which should be taken into account, such as the attitude and demeanor of the witness, the extent of the witness's intelligence and the degree of moral responsibility with which the witness is capable. And it cites in that case the *Beausoliel* case which I have already referred to.

Under the circumstances, the child will be permitted to testify in this case. (Tr. 182-185.)

Keith Elliott took the stand and testified that appellant was his uncle and that he lived with appellant and the deceased. Keith said appellant was in the bedroom with the decedent when he heard a shot. Before the shot appellant slapped her (238-239).

Officer Parker was recalled and testified that when he arrived at the apartment he saw a gun on the bed. He said appellant had told him that the gun was his (Tr. 361). He said he kept the gun in a dresser drawer (Tr. 365).

Case for the Defense

At the conclusion of the Government's Case, appellant requested a directed verdict of acquittal on the grounds that the Government had not presented sufficient evidence for the case to go to the jury (Tr. 420). After arguments of counsel the court denied appellant's motion (Tr. 440-441).

Appellant testified that he had lived with the deceased and loved her (Tr. 483). The day of the shooting he came home from a service station where he had been drinking with some friends, took a bath, changed his clothes and started to leave the apartment. The decedent asked him where he was going, to which he answered he was going out. She asked to go and when appellant said no she said to take Keith with him (Tr. 489). Appellant told Keith to get his coat and as he was standing near the apartment door he heard a gun shot (Tr. 489-490). He turned, walked into the apartment and saw the decedent sliding down beside the wall with blood coming out of her nose and mouth (Tr. 490). Appellant took the gun which had dropped out of her hand, picked it up by the barrel and laid it on the foot of the bed (Tr. 494). Appellant called the police and Officer Parker was the first to arrive (Tr. 494).

ARGUMENT

- I. The police were not required to apprise appellant of his *Miranda* rights while they were conducting a general investigation at appellant's request, particularly when they had no reason to suspect appellant of having committed the crime.

(Tr. 55-56, 188-190, 494)

Appellant argues that certain statements made by him to Officer Parker at the apartment were made prior to being advised of his rights as required by *Miranda v. Arizona*, 384 U.S. 439 (1966), and were therefore inadmissible at trial. We disagree.

During the time period from Officer Parker's arrival at the apartment where decedent's body was found until Detective Ruiz of the Homicide Unit arrived and placed appellant under arrest, appellant had not been "taken into custody or otherwise deprived of his freedom of action in any significant way" *Id.* at 444. The Supreme Court in *Miranda v. Arizona*, *supra* at 477-478 stated clearly that:

"General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."

In the present case, appellant called the police himself to inform them of the homicide (Tr. 55, 494). Thus, the presence of Officer Parker at the apartment was not the result of a police investigation of appellant as a suspect, but rather a response to appellant's own telephone call. *Hicks v. United States*, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967).

There is nothing in the record to suggest that after Officer Parker arrived at the apartment appellant was

deprived of his freedom of action in any significant way. Officer Parker asked appellant to step away from the bed where a gun lay, and get off the telephone. Then upon seeing the body, he asked appellant to step into the dining area off the living room, after which Officer Parker notified the police dispatcher of the situation (Tr. 55-56). At this point there was absolutely no reason for Officer Parker to suspect appellant of shooting the decedent, particularly when appellant had called the police himself and told Officer Parker that the decedent had shot herself.

Accordingly, when Officer Parker asked appellant to sit down in the kitchen and tell him what happened he was under no requirement, constitutional or otherwise, to advise appellant of his rights as set forth in *Miranda v. Arizona*, *supra*. Although in some situations it may be difficult to determine when one is in "custody" so as to require a police officer to warn an individual of his *Miranda* rights, such is certainly not the case here. This case presents a good example of a investigation, uninitiated by the police, to determine *what happened*, as opposed to *who did it*.²

Judge Leventhal discussed this pre-custodial questioning problem in *Allen v. United States*, — U.S. App. D.C. —, 390 F.2d 476 (1968), at 479:

Whether police have left the channels of investigation and run into the shoals of "custodial interrogation" cannot be determined by reference to some chart clearly designating the various lights, bells, buoys and other channel markers. Nor is it possible or desirable to simplify the matter by saying that whenever any officer is prepared to detain an individual he may not ask any questions. Such a rule

² It was not until later, when Detective Ruiz of the Homicide Unit had arrived, asked if there had been any witness and talked to little Keith Elliott, that the police had any reason to suspect appellant. Immediately upon talking to Keith, Detective Ruiz went back into the apartment, placed appellant under arrest and informed him of his rights (Tr. 188-190).

would venerate form over the substance of sound relations between police and citizens in a large community. We think the relative routineness of an inquiry is a material indicator that the police are still in a state of investigation. The police talk to too many people in the course of a day to make warnings compulsory every time they inquire into a situation. Such a requirement would hamper and perhaps demean routine police investigation. Indeed excessive admonitions are likely to make cooperative and law-abiding citizens anxious and fearful out of proportion to the need for admonitions in advising prime suspects of their rights."

Appellant relies on *Mathis v. United States*, 391 U.S. 11 (1968) and *Orozco v. Texas*, 394 U.S. 324 (1969) for his assertion that one does not have to be "in custody" to require the police to advise him of his *Miranda* rights, as long as his freedom of action is partially circumscribed (App. B. pp. 16-17). In response to this position the Government would make several comments. First of all, the record in this case, as set out above, shows appellant was not deprived of his freedom of action in any *significant* way.

Secondly, appellant's reliance upon *Mathis*, *supra* is misplaced. In that case the court held that a suspect did not have to be "in custody" for the charge for which he was being investigated to require that the police (IRS agents) advise him of his *Miranda* rights. What appellant omits to mention in his brief, however, is the all important fact that at the time he was being questioned the appellant in the *Mathis* case was already in jail, where his freedom of action was completely circumscribed.

Finally, the situation in the *Orozco* case is not analogous to this case. In *Orozco* the police went to Orozco's boarding house bedroom on their own initiative in search of Orozco, whom they already suspected of having committed homicide. Consequently, when the police confronted him in the bedroom it was clear Orozco was in custody, and the court held that one didn't have to neces-

sarily be at a police station to be in custody if the facts show his freedom of action is substantially curtailed.³

II. The trial judge did not abuse his discretion by permitting Keith Elliott to testify after having conducted an extensive hearing on the question of competence.

(Tr. 171-185, 467-470)

Appellant challenges the trial judge's ruling, after extended testimony of witnesses and arguments of counsel, that Keith Elliott, an eight year old boy who was in the apartment at the time of decedent's death, was competent to testify at the trial. This court has clearly stated that the competency of a child to testify is a matter within the discretion of the trial court which will not be disturbed unless error is clearly manifest. *Beausoliel v. United States*, 71 U.S. App. D.C. 111, 107 F.2d 292 (1939); *Doran v. United States*, 92 U.S. App. D.C. 305, 205 F.2d 717 (1953), *cert. denied*, 346 U.S. 828 (1953).

There is no set rule which determines the age a person must be before he is competent to testify as a witness. In *Wheeler v. United States*, 159 U.S. 523 (1895), a case involving a five year old boy, the Supreme Court upheld a trial judge's determination that the boy was competent. In doing so it said "While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his primary duty to tell the former" *Id.*, at 524.

In *Beausoliel v. United States*, *supra*, which was relied upon by the trial judge in making his determination that eight year old Keith Elliott was competent to testify at the trial, this court set out at length the factors to

³ See *Hicks v. United States*, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967) where appellant had gone with police to the station but the facts of the case were such that she was not in custody.

be considered in determining whether a child is competent to testify:

The proper test in determining the qualifications of such a witness is not whether he believes in the devil or that liars will be punished after death, but whether the child has sufficient intelligence to have a just appreciation of the difference between right and wrong, and a proper consciousness of the punishment of false swearing. This has been otherwise expressed by an eminent text-writer as follows:

"(1) the capacity of *observation*—is the first of the essential requirements, and has been occasionally so noted by the Courts. (2) the capacity of *recollection* is also an essential requirement; though little likely to be called into question, and probably often intended to be covered by the expressions defining the next requirement. (3) For the capacity of *communication*, as in the case of mental derangement—, there are two elements to be taken into consideration: (a) there must be a capacity to *understand* questions put, and to frame and express intelligent answers. (b) there must be a sense of moral responsibility—a consciousness of the duty to speak the truth." *Id.*, at 113

In making his determination that Keith Elliott was competent to testify, the trial judge relied upon the standards set out in *Beausoliel, supra*. His ruling that Keith possessed the capacity of observation, recollection, and communication (Tr. 182-185) is fully substantiated by the record. The trial judge's ruling was the result of a lengthy hearing and clearly set out the basis for the result it reached. As such, the ruling was clearly not an abuse of the trial judge's discretion, and there being no error, manifest or otherwise, it should not be disturbed on appeal.⁴

Appellant further alleges that it was error for the trial judge to refuse to allow him to introduce evidence

⁴ In fact, during the course of the trial in argument before the court, counsel for appellant specifically stated that Keith Elliot was not under a disability at the time he testified (Tr. 431).

to the jury of a head injury suffered by Keith Elliott while he was three years old, five years prior to the trial, in order to impeach the boy's credibility and reliability.

Testimony as to Keith Elliott's earlier head injuries had been brought out in full during the competency hearing (Tr. 171-182). Appellant's attempt to have this testimony put before the jury was properly denied. The accident during which Keith Elliott allegedly received a head injury occurred a good five years prior to his testimony at the trial. Furthermore, the testimony proffered with respect to the injury (Tr. 467-470) was only that of the woman who was caring for the boy at the time, who would not appear to be medically qualified to testify as to the extent of the injury and its effect, if any, upon the boy's ability to give credible testimony five years later.

III. Appellant was not prejudiced by the Government's unobjected to reference to a slapping incident which counsel for appellant himself discussed before the jury during closing argument.

(Tr. 239, 241-242, 431, 438; Tr. 52 Closing Argument)

During Keith Elliott's testimony before the jury he was asked if he heard anything in the bedroom before the shot and he replied he heard appellant slap the decedent. Appellant objected to the remark but the court overruled the objection on the ground Keith was stating what he heard.⁵ Shortly thereafter Keith was asked if

⁵ The testimony went as follows:

"Q. What did you hear before the shot?

A. First—He slapped her first.

Q. And then what happened, Keith?

Mr. David: Objection. I move the answer be stricken because the young child told the prosecutor he was not in the room with the other two parties. So, how could he see a slap?

The Court: He was asked what he heard. The answer was that he slapped her. How he determined this, I don't know. The objection will be overruled." (Tr. 239).

he heard any other noise in the bedroom or in the room aside from the slap and the shot, to which Keith answered "No Sir" (Tr. 241). The following discussion then ensued:

"Mr. David: I am going to object to that and ask that the answer be stricken because there is no testimony on the part of the boy that he observed a slap.

The Court: Keith—

The Witness: Sir?

The Court: You said that Jesse slapped Mildred?

The Witness: Yes, Sir.

The Court: How do you know that?

The Witness: He slapped before he shot.

The Court: How do you know that he slapped her? Did you see him slap her?

The Witness: No Sir.

The Court: How do you know?

The Witness: He had slapped her.

The Court: How do you know that? Did you see it?

(The witness nodded his head in the negative.)

The Court: All—

The Witness: Well, he slapped her.

The Court: I will grant the motion to strike the last answer that he gave, that he slapped her. The jury will disregard that." (Tr. 241-242).

It is not at all clear from the above record what the extent of the trial judge's ruling actually was. The Court specifically said "I will grant the motion to strike the last answer that he gave, that he slapped her." (Tr. 242, Emphasis supplied). The motion before the judge at this time was an objection to Keith's negative reply to the question of whether he had heard anything besides the slap and the shot (Tr. 241). The trial judge did not request the jury to disregard all previous references to the slapping and gave no indication that he was countermanding his prior overruling of appellant's motion to strike Keith's answer that appellant slapped the decedent

before the shot (Tr. 239). That the trial judge had no intention to bar all further reference to the slapping episode is evidenced by his condoning of the Government's reference to it during the argument on appellant's motion for a directed verdict of acquittal (Tr. 438), (to which appellant did not object), and the trial judge's own reference to it when he ruled against the motion.⁶ Furthermore, not only did counsel for appellant not object to the later reference to Keith's slapping testimony, but he made reference to it himself during closing argument to the jury (Tr. 52, Closing Arguments). Consequently, the prejudice suffered by appellant would appear to be minimal, if at all, and certainly not such that an objection on appeal would be sustainable.

IV. Appellant's further arguments with respect to a government witness are without merit.

(Tr. 381, 393-394, 397-413, 487, 514, 546-547)

Appellant's argument that the Government erred in calling Bertha Gaither as a witness because of certain alleged inconsistencies in her testimony and other out of court evidence not of record on appeal, is without merit.

Bertha Gaither was called as a witness by the Government and was cross-examined by counsel for appellant at length (Tr. 403-413). During this cross-examination counsel for appellant had access to Mrs. Gaither's prior statement to the homicide squad, which had been made available to him during a recess (Tr. 403). These prior statements were essentially consistent with Mrs. Gaither's testimony (Tr. 397-402).⁷

⁶ The references to the slapping episode in this instance were out of the presence of the jury. The only reference to the jury of the incident after the judge's ruling was during closing arguments where *both* counsel made mention of it.

⁷ Government's Exhibit 26 for identification, which contained Mrs. Gaither's prior statements, was never introduced into evidence and is therefore not a matter of record to be considered on appeal. *Johnson v. United States*, D.C. Cir. No. 21,851 decided June 20, 1969.

Appellant says that he was not in the apartment the evening of February 1, 1969 when Mrs. Gaither talked to the decedent (Tr. 487, 514, 546-547). Because of this denial and because appellant stated two persons saw him at the service station at that time, appellant claims the Government should not have called Mrs. Gaither as a witness. The credibility of Mrs. Gaither and appellant as witnesses was clearly a determination to be made by the jury. *Johnson v. United States*, D.C. Cir. No. 21,851, decided June 20, 1969. *Coates v. United States*, D.C. Cir. No. 22,067, decided April 7, 1969.

Appellant also discloses that a card found in deceased's billfold (Gov't Ex. 23) had a notation with respect to an appointment with a Dr. Williams two days before this Doctor was recommended to her by Mrs. Gaither. First of all, the wallet was the only object introduced into evidence or testified to (Tr. 381); being the object which contained Government exhibits 24 & 25, classified ads (Tr. 393-394). It was emphasized that the wallet was being introduced into evidence merely as a *container* (Tr. 394). Consequently, the other contents of the wallet, including the appointment card referred to by appellant in his brief, are not evidence of record in the case and should not be considered on appeal. *Johnson v. United States*, *supra*, Slip. Op. at 8.*

* However, even if it were proper to consider the appointment card as evidence of record on appeal, the information on it was presumably available to appellant at trial and should have been put before the jury at that time. Furthermore, only that part of Mrs. Gaither's testimony which concerned the actual date she talked to the decedent on the phone is disputed by the information on the appointment card, rather than her testimony that she overheard appellant threaten the decedent. Accordingly, the fact that the information on the card was not brought before the jury cannot be considered plain error affecting substantial rights of appellant.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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Assistant United States Attorneys.

No. 21,933

. IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JESSIE ELLIOTT, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the
United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 1 1969

Nathan Paulson
Clerk

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Attorney for Appellant
(Appointed by this Court)

(i)

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REPLY BRIEF FOR APPELLANT

The arguments advanced by the appellee in response to those contained in appellant's opening brief were not wholly unanticipated and were partially covered in our opening brief. A few additional remarks will serve to highlight the chief points to be resolved.

I

Failure to Apprise Defendant
of His Miranda Rights

On the premise that the accused's freedom of action had not been curtailed "in any significant way" (Gov. Br. pp. 8,10), counsel for the Government argue that the police were under no duty to advise the defendant of his Miranda rights prior to his formal arrest and that various statements allegedly made by him to the police while being interrogated by them were therefore admissible (Gov. Br. pp. 8-11).

Neither Miranda v. Arizona, 384 U.S. 436 (1966) nor the facts surrounding defendant's pre-arrest interrogation support said premise. Miranda is not couched in terms of a significant curtailment of the defendant's freedom of action. It precludes "any" curtailment. As noted by Justice Black, speaking for a 6-2 majority in Orozco v. Texas, 37 L.W. 4260 (March 25, 1969), "The Miranda opinion declared that the warnings were required when the person being interrogated was 'in custody at the station or otherwise deprived of his freedom of action in any way.' 384 U.S. 436, 477" (emphasis by the Court).

As pointed out in our opening brief (pp. 5-7, 17-19), though Elliott himself had called the police, his freedom of action was curtailed from the moment that Officers Parker and Harris arrived at the scene of the shooting. Elliott was the

only adult at the scene.^{1/} Parker walked into the apartment and thence into the bedroom where the defendant was on the phone. To use Parker's euphemistic expression, he proceeded immediately to move a gun he saw on the bed "out of the way" (Tr. 55, 57), a pretty clear indication that defendant in Parker's view was not "above suspicion".^{2/} Equally euphemistically Officer Parker testified that he then "asked" Elliott to get off the phone and step into the dining area with Private Harris (Tr. 55). He next put in a call for the Homicide Squad, and apprised the dispatcher "as to what the situation was at that time" (Tr. 56), phraseology suggesting that in Parker's view he had a "situation" on his hands. Thereupon the defendant was told (ordered?) to "have a seat in the kitchen until such time as the Homicide Squad arrived on the scene" (Tr. 58; cf. Tr. 68). Two more officers arrived in advance of the Homicide Squad -- a further indication that something more than an accidental shooting or suicide was involved (Tr. 73-85). While awaiting the arrival of the latter, Officer Parker, to use his words, had a "conversation" with the accused about what happened (Tr. 59). At no time did Officer

^{1/} Everyone found at the scene of a homicide, until exculpated, is deemed a "suspect" by the police. See Hicks v. United States, 127 U.S. App. D.C. 209, 211, 382 F.2d 158 (1967).

^{2/} Efforts by defense counsel to show in what respects the accused's "freedom of action" were circumscribed prior to his formal arrest were erroneously sustained by the trial judge (Tr. 68, 199-200, 205-208, cf. Tr. 575).

Parker advise Elliott of his right to remain silent, or his right to an attorney, or of the fact that anything he said could be used against him (see Tr. 68-69).

When Detective Ruiz of the Homicide Squad arrived, he checked the body, asked Parker if there were any other witnesses, talked to Keith across the hall where Parker had sent the little boy, and immediately proceeded to place Elliott under arrest (see Gov. Br. p. 3). The prompt placement of Elliott under arrest by Officer Ruiz belies the assertion by Government counsel that "there was absolutely no reason for Officer Parker to suspect appellant of shooting the decedent" prior to the arrival of the Homicide Squad (Br. p. 9). As heretofore noted (Opening Br. pp. 19, App. A, p. 6), Officer Parker let it slip at the preliminary hearing that he had in fact, though not formally, placed Elliott under arrest before Detective Ruiz arrived.

One would be naive, indeed, to believe that Elliott's freedom of action, after he had been directed to take a seat in the kitchen pending the arrival of the Homicide Squad, and while Officer Parker proceeded to interrogate him on what had happened, was in no way curtailed, that he would not have been physically "detained" had he tried to leave. Under Miranda and its progeny, the accused's responses to questions there asked by Parker were thus inadmissible. His answers, as recalled

by Parker, differed in various particulars from his subsequent testimony in court thus greatly affecting his credibility in the eyes of the jury (cf. Tr. 42-43, 302, 329, 335, 363-364; 422, 548-549, 554, 568; Closing Argument, pp. 21-23). No less significant inconsistencies can be found in Parker's three separate summaries of matters leading up to the arrest -- his official report of the shooting (Gov. Ex. 2 for identification), his testimony at the preliminary hearing (Appellant's Br. App. A, pp. 1-7), and his testimony in the instant proceeding (Tr. 52-69).

II

Keith's Competency and Credibility

As recognized in our opening brief (pp. 19-23), the initial determination whether a child of tender years is competent to testify is generally a matter for the trial judge. The situation here was not precisely an ordinary one. At the preliminary hearing Keith (then seven) was used by neither side, an indication of some doubts about his competency. In the instant proceeding, though the date of the trial was twice postponed at the Government's request to have the little boy (then eight) brought to Washington from South Carolina, the prosecuting attorney made no mention of this witness in his opening statement to the jury because of doubts he too had whether Keith would be adjudged competent to testify (cf. Tr. 437).

That there was a real basis for those doubts is borne out by the unsuccessful efforts of the Assistant District Attorney to qualify Keith as a witness on the first day of the trial (Tr. 70-73), 281). At that point, at the Government's suggestion, Keith was "excused" (Tr. 72), later characterized as "withdrawn" (Tr. 73). Four days later over defendant's vigorous objections (Tr. 153-155), Keith was recalled and subsequently allowed to testify, notwithstanding uncontroverted evidence that the child at the age of 3 or 4 had suffered a serious head injury, resulting in his hospitalization for some 6 months, and hadn't been considered "normal" since (Tr. 160-163, 172-180). It was undisputed that the child, though he had started to school at five and was eight years of age at the time of the trial, was still in the first grade, with nothing to indicate that the boy had missed any substantial time from school during those three years (Tr. 172, 174, 180, 237).

Furthermore, the second voir dire and subsequent testimony of the little boy shows that he answered the prosecutor's questions almost before they were asked (Tr. 152-186, 236-263). Yet his responses to the relatively simple questions asked by the trial judge and by defense counsel, even when answered, came through much less clear (see Tr. 240-241, 245, 251, 252, 258, 259-260, 262).

But even assuming that the trial judge did not err in allowing the boy to be recalled over defendant's objections

(Tr. 153-155) and to testify in this proceeding (Tr. 184, 185), the question of his credibility and the weight which should be given to his testimony were matters which defendant should have been allowed to develop before the jury. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950). That case stands squarely for the proposition that a witness may be discredited by evidence of insanity or mental derangement, and such evidence is not merely for the judge on the preliminary question of competency but goes to the jury to affect credibility. See also Chicago & N.W. Ry. Co. v. McKenna, 74 F.2d 155, 158 (C.A. 8, 1934), where the long use of drugs on a witness' mental faculties was allowed to go to the jury as bearing directly on his credibility.

Here the jury was totally unaware of the brain concussion which the little boy had suffered at the age of three or four, of his long sojourn in the hospital, of his lack of normalcy, of his 3 years spent in the first grade (cf. Tr. 427-428). All efforts by counsel for the defendant to place these significant facts before the jury, so that they could more intelligently decide whether to give greater credence to the little boy's testimony or to that of the accused, were rejected (Tr. 465-474, 500-501; cf. Tr. 251-252).

If the Government had any question about Mary Elliott's qualifications to testify about Keith's competency (cf. Br. p. 13), such an objection on that ground should have been made known at the

time of the trial, not now when it is too late for defense counsel to call additional witnesses (e.g. Keith's attending physician).

That Keith's testimony was not entirely reliable is further evident from his Jenck's Act statement where he claimed to have heard two shots (Gov. Ex. 20), whereas it is undisputed that only a single shot was fired (Tr. 88, 92, 123, 129; Gov. Ex. 3, 507, Tr. 89, 92-93).

III

Keith's "Slapping" Testimony

To the question "what did you hear before the shot," the little boy said, "He slapped her first". (Tr. 239). Since the child admittedly was not in the bedroom and did not see what happened, defense counsel asked that the question and answer be stricken (Tr. 239). That motion, at that point, was overruled (Tr. 239). When the U.S. Attorney subsequently asked the boy what other noises he heard "besides the slap and the shot", defense counsel renewed his objection (Tr. 241-242). The trial judge ultimately ordered the answer "he slapped her" stricken, and instructed the jury to "disregard that" (Tr. 242).

In view of what happened before and subsequently, this brief and equivocal instruction failed to cure the damage caused by first allowing the testimony and then ambiguously ordering it disregarded. To make matters worse the stricken

testimony continued to be mentioned throughout the trial. In arguing against a motion for a directed verdict of acquittal, Government counsel referred to the "slapping" testimony (Tr. 438) as did the trial judge in denying that motion (Tr. 440). And in his closing argument to the jury, Government counsel twice referred to the "slapping testimony" (Oral argument transcript, Feb. 8, 1968, pp. 20, 29), which defense counsel apparently thought it best to counteract by pointing out that the little boy (in the living room) couldn't have know who slapped whom in the bedroom (Oral argument, p. 52). For Government counsel to continue to mention testimony which the jury was belatedly told to disregard, whether subsequent references thereto were objected to or not, can not be condoned. It was this very testimony on which the U.S. Attorney in part relied to show malice aforethought.

If, as Government counsel now suggest (Br. p. 14), the Court's instruction to "disregard that" (Tr. 241) was ambiguous, as well it was, it certainly did not cure the error of allowing identical testimony to be received over defendant's objection two pages earlier (Tr. 239). Nor did it justify the trial judge's reliance on such testimony in rejecting defense counsel's motion for a directed verdict at the conclusion of the Government's case (Tr. 440) and its renewal when the taking of evidence was concluded (Tr. 593).

IV

Bertha Gaither's Testimony

In her pre-trial statement of February 12, 1967 to Detective Ruiz (Gov. Ex. 26), Mrs. Gaither said that Mildred Williams had called her on Wednesday, February 1, 1967, about 6:00 p.m. (two days before the shooting), asking for the name of a psychiatrist because "Jessie was acting real crazy."^{1/} Mrs. Gaither recommended a Dr. Williams. Tucked away in Mildred's billfold, found after her death and received in evidence as Gov. Ex. 23, was a printed card showing an appointment she apparently had with "E. Y. Williams, M.D. Neuro-Psychiatrist", for "January 30 [1967] 7:00 p.m.", two days before any such telephone call.

That counsel for the Government, pressed with other matters, failed to note the blatant inconsistency between Mrs. Gaither's pre-trial statement and the appointment card in decedent's wallet (Gov. Ex. 26) is not too surprising. But it does come as something of a shock, when this discrepancy is called to their attention, for Government counsel (Br. p. 16) to continue to defend their actions in repeatedly asking the accused on cross-examination whether he was home on February 1

^{1/} It was during this same February 1 conversation that she allegedly heard the accused threatening to kill Mildred if she left him (Gov. Ex. 26).

at 6:00 p.m. (the date and time of the alleged telephone call), and pillorying him for his vehement assertions that he was not (see Tr. 487, 514, 546-547). Had the prosecuting attorney known, as we now do, that Mrs. Gaither was completely in error regarding the date of Mildred's call, it would have been indefensible for him to ask the accused where he was on February 1, and thereby discredit him in the eyes of the jury, whichever way he answered the question.

In his closing argument to the jury, counsel for the Government made much of this alleged telephone call of February 1 (Tr. 19, 24):

"Then, of course, the prior threat heard just two days, two days before the killing, when Mildred called her sister-in-law Bertha Gaither and was talking to her and over the background Bertha told you she could hear the defendant yelling, Mildred, if you leave me I'll kill you.

"There is the motive, there is the motive for what happened, ladies and gentlemen of the jury."

.

"He denied ever being home when Bertha Gaither told you that she heard him yelling in the background. She was talking with Mildred two days before the shooting. Again, ladies and gentlemen, that is not the kind of testimony about which Bertha could be mistaken. It's either a lie on her part or a lie on his, and I submit to you it is a lie on his."

The trial judge in rejecting the motion for acquittal, likewise made mention of the asserted February 1 threat, just two days before the shooting (Tr. 440).

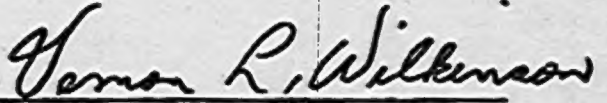
Whether a conversation such as Mrs. Gaither described ever took place we can only surmise; that it didn't take place on February 1, during which she allegedly gave her sister-in-law the name of a psychiatrist (Dr. Williams) is completely belied by the card in her wallet showing an appointment with that selfsame doctor two days prior thereto.

Conclusion

For the reasons here stated, and those set forth in our opening brief, the conviction and judgment of the court below must be reversed, with the case remanded for further proceedings not inconsistent therewith.

Respectfully submitted,

By


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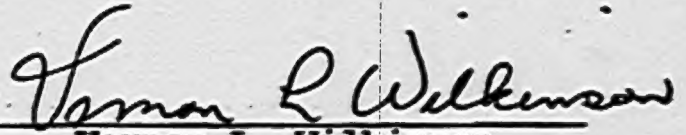
Attorney for Appellant
(Appointed by this Court)

October 1, 1969

CERTIFICATE OF SERVICE

I, Vernon L. Wilkinson, certify that I have this 1st day of October, 1969, served by United States mail, postage prepaid, copies of the foregoing Reply Brief for Appellant in Case No. 21,933 on the following:

Thomas A. Flannery, Esq.
United States Attorney
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Vernon L. Wilkinson